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# Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates

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# Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates

Kyu Ho Youm\*

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## I. INTRODUCTION

Television has been an increasingly predominant player in American election politics over the years, especially with presidential elections in the United States. In 1993, Newton M. Minow, director of the Annenberg Washington Program, and Marvin Kalb, director of the Joan Shorenstein

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Barone Center at Harvard University, stated "[t]he modern presidential campaign is essentially a television event. The campaign reaches nearly all voters through television, and it reaches some of them exclusively through television; for them, the television campaign is the campaign."<sup>1</sup>

Given the undisputed impact of television on election campaigns, it is little wonder that the television debate<sup>2</sup> between political candidates has emerged as one of the most crucial events for voters and candidates. NBC Executive Producer William O. Wheatley, Jr. said:

I believe the Presidential debates to be of critical importance in the way our nation goes about choosing a leader. Indeed, it seems clear that they have become the most important events of the election-year calendar, the best opportunity for the candidates to make their cases directly to a large audience of potential voters and the best chance for the voters to listen carefully and weigh what the candidates have to say.<sup>3</sup>

On the other hand, various issues relating to television debates have been a topic of heated discussion among politicians and broadcasters over the years.<sup>4</sup> Congress held hearings on presidential debates on television in June 1993. Al Swift, chairman of the House Subcommittee on Elections, noted during the hearings: "If Presidential debates are now a fixture, then they should be presented to the voters in the most unfiltered and fair way possible. Many questions need to be addressed. Who should sponsor

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1. NEWTON N. MINOW & MARVIN KALB, *Preface*, in *THE FUTURE OF PRESIDENTIAL DEBATES* 4 (1993).

2. "Television debates" are distinguishable from "televised debates." While "television debates [are an] undisguised creature of the medium—a political 'talk show' which is created for and by television" and in which "the audience acts like a studio audience for a television program oriented toward talk rather than action," televised debates are "[largely [presented] from the perspective of the immediate audience" and "the television camera is covering an event, rather than creating one." SUSAN A. HELLWEG ET AL., *TELEVISED PRESIDENTIAL DEBATES: ADVOCACY IN CONTEMPORARY AMERICA* 29, 30 (1992) (citations omitted). Regardless, this Article draws no distinction between television debates and televised debates.

3. *Presidential Debates: Hearing Before the Subcomm. on Elections of the House Comm. on House Administration*, 103d Cong. 121 (1993) [hereinafter *Hearing on Presidential Debates*] (statement of William O. Wheatley, Jr.); see also SIDNEY KRAUS, *TELEVISED PRESIDENTIAL DEBATES AND PUBLIC POLICY* 24 (2d ed. 2000).

4. See generally JOHN B. ANDERSON, *A PROPER INSTITUTION: GUARANTEEING TELEVISED PRESIDENTIAL DEBATES* (1988); WILLIAM L. BENOIT & WILLIAM T. WELLS, *CANDIDATES IN CONFLICT: PERSUASIVE ATTACK AND DEFENSE IN THE 1992 PRESIDENTIAL DEBATES* (1996); KATHLEEN HALL JAMIESON & DAVID S. BIRDSSELL, *PRESIDENTIAL DEBATES: THE CHALLENGE OF CREATING AN INFORMED ELECTORATE* (1988); HELLWEG ET AL., *supra* note 2; DAVID J. LANOUE & PETER R. SCHROTT, *THE JOINT PRESS CONFERENCE: THE HISTORY, IMPACT, AND PROSPECTS OF AMERICAN PRESIDENTIAL DEBATES* (1991); *THE PAST AND FUTURE OF PRESIDENTIAL DEBATES* (AUSTIN RANNEY ed., 1979).

these debates? . . . Who should be included? . . . What is the role of the media . . . ?”<sup>5</sup>

The questions posed by Swift are not separate from each other; they overlap in that the broadcast media's direct participation as a sponsor of candidate debates often involves the media in determining who should be included in or excluded from the debates. Also, what kind of broadcast media are involved as debate sponsors? Are the sponsoring media public stations or private commercial stations? These and related questions can be critical because the fundamental rationale behind public broadcasting differs significantly from that of commercial television.<sup>6</sup> Nevertheless, public television and radio stations operated by state and local governments have the same rights and responsibilities under the First Amendment as any private commercial station.<sup>7</sup> On the other hand, judicial interpretations of the editorial rights of state-owned stations in their programming decisions have yet to offer a sense of consistency and predictability to public broadcasting stations.

The U.S. Court of Appeals for the Fifth Circuit, for example, held in 1982 that the First Amendment rights of viewers do not impose limits on the programming discretion of public television stations licensed to state instrumentalities.<sup>8</sup> The court found that the public television stations in question did not provide the general public a right of access and held that they were not “public forums.”<sup>9</sup> By contrast, the U.S. Court of Appeals for the Eighth Circuit in *Forbes v. Arkansas Educational Television Communication Network Foundation (Forbes I)*<sup>10</sup> ruled that government-owned television stations could be limited public forums when they sponsor debates for political candidates. The Eighth Circuit in *Forbes v. Arkansas Educational Television Commission (Forbes II)*<sup>11</sup> affirmed its earlier conclusion that the debate was a limited public forum and a legally qualified candidate could be excluded only if the public station sponsoring the debate had a compelling and narrowly tailored governmental interest.<sup>12</sup>

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5. *Hearing on Presidential Debates*, *supra* note 3, at 1 (statement of Al Swift).

6. For a discussion of the differing rationale behind public broadcasting vis-a-vis commercial broadcasting, see *infra* notes 139-40 and accompanying text.

7. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

8. See *Muir v. Alabama Educ. TV Comm'n*, 688 F.2d 1033, 1041 (5th Cir. 1982), *cert. denied*, 460 U.S. 1033 (1983).

9. *Id.* at 1042. The traditional “public forums” are historically recognized as easily accessible places where people traditionally gather to communicate their thoughts and discuss public questions. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

10. 22 F.3d 1423, 1429 (8th Cir. 1994).

11. 93 F.3d 497 (8th Cir. 1996).

12. See *id.* at 504-05.

In an effort to clarify the lower courts' conflicting interpretations of the editorial decisions of public broadcasting stations, the U.S. Supreme Court in May 1998 addressed whether a state-owned public television station creates a limited public forum open to all legally qualified candidates by conducting a debate among political candidates.<sup>13</sup> In *Arkansas Educational Television Commission v. Forbes*,<sup>14</sup> the Court held that a state-owned public television station did not violate the First Amendment by excluding a third-party candidate from a political debate organized and broadcast by the television station because the debate was a nonpublic forum.<sup>15</sup>

Professor Burt Neuborne of the New York University School of Law characterized *Forbes* as "a First Amendment tie" because it granted "broad but not unlimited discretion" to select candidates for a debate sponsored by public television.<sup>16</sup> But *Forbes* is more than a number on the First Amendment score card of the Rehnquist Court. As law Professor Bernard James at Pepperdine University argued in August 1998, while the issues involved "at first glance, are relatively narrow in scope and relevant to limited audiences," *Forbes* is "worthy of closer examination" because the case indicates that "the fabric of free-speech protection is woven less tightly than many assume, allowing government to control speech in ways that would be unconstitutional without the use of some special power or a narrow exception on which to rely."<sup>17</sup> From a long-term perspective on the First Amendment jurisprudence, *Forbes* illustrates the Supreme Court's willingness to draw "institutional distinctions in the context of free speech questions arising within the precincts of government."<sup>18</sup>

Considering the enormous implications of *Forbes*—especially for public broadcasting—this Article examines various First Amendment issues involved in *Forbes*. Three questions provide the main focus of the Article. First, what is the constitutional and statutory framework for political candidates' access to television debates? Second, how did courts interpret the political candidates' claims for access to public television debates prior to *Forbes*? Finally, how did the U.S. Supreme Court in

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13. See Linda Greenhouse, *Court Weighs Weeding Out of Candidate in TV Debate*, N.Y. TIMES, Oct. 9, 1997, at 28.

14. 523 U.S. 666 (1998).

15. See *id.* at 676.

16. Burt Neuborne, *Free Expression and the Rehnquist Court*, in COMMUNICATIONS LAW 1295-96 n.50 (1998).

17. Bernard James, *In Two Cases, Court OKs Speech Limits*, NAT'L L.J., Aug. 10, 1998, at B15.

18. Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 86 (1998).

*Forbes* balance the conflicts between the candidates' access rights and the public broadcast media's editorial freedom?

## II. TV DEBATES UNDER THE COMMUNICATIONS ACT

Congress regulates broadcasting differently than the print media.<sup>19</sup> The First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .,"<sup>20</sup> does not apply to broadcasters in the same way it does to publishers. As the Supreme Court stated in 1969, various mass media may be treated differently under the First Amendment and broadcasters' rights are not equal to those of the print media.<sup>21</sup>

The Communications Act of 1934, as amended,<sup>22</sup> requires licensing of radio and television stations, while there is no such requirement for the print media. This regulatory framework for broadcasting communication is derived from the scarcity of the radio spectrum, which should be used for the general public. Justice Felix Frankfurter, in a "classic statement of the justification for government regulation in broadcasting,"<sup>23</sup> stated:

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the [Act] was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.<sup>24</sup>

Content regulations of broadcasting, which are also based on the scarcity of radio waves,<sup>25</sup> are extensive to such a degree as to be patently

19. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 107-14 (1993).

20. U.S. CONST. amend. I.

21. See *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

22. See 47 U.S.C. §§ 307(a), 315(a) (Supp. II 1996 & 1994) (licenses are awarded "if public convenience, interest, or necessity will be served thereby" and licensees are required to "operate in the public interest").

23. Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 7 n.21 (1976).

24. *National Brdcast. Co. v. United States*, 319 U.S. 190, 226-27 (1943).

25. Professor J.M. Balkin of the Yale Law School is critical of the scarcity rationale for the content regulation of the broadcast media. He wrote in 1996:

The most common argument for special content-based regulations of the media is based on the scarcity of the airwaves. The word "scarcity" is poorly chosen. All

unconstitutional if applied to the print media. The personal attack rule is a good example. This rule requires that if a person is attacked on his honesty, integrity, character, or similar personal qualities "during the presentation of views on a controversial issue of public importance," he should be provided a reasonable amount of free time to respond by the broadcasting station involved.<sup>26</sup> The Supreme Court upheld the rule, reasoning that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused" and that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>27</sup>

By contrast, the Supreme Court struck down the "right of reply" statute challenged in *Miami Herald Publishing Co. v. Tornillo*.<sup>28</sup> The right of reply law resembled the personal attack rule at issue in *Red Lion Broadcasting Co. v. FCC*,<sup>29</sup> except that the former applied to the print media while the latter to broadcasting. The Court held that the reply statute was an unconstitutional governmental restraint on the press because it "exact[s] a penalty on the basis of the content of a newspaper."<sup>30</sup> The Court declared that "[a] responsible press is an undoubtedly desirable goal, but

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valuable resources are scarce. The scarcity problem in broadcasting stems from the fact that no two broadcasters can use the same frequency at the same time in the same geographical area, or they will block each other out. But this problem can be dealt with by creating a system of property rights dividing up the airwaves according to frequency, time, place, and broadcasting power; it does not require a system of government licenses. Moreover, the existing system has actually created an artificial scarcity in broadcast television. Many VHF and UHF channels go unused in many localities.

J.M. Balkin, *Media Filter, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1133-34 (1996) (footnotes omitted).

26. 47 C.F.R. § 73.1920(b) (1996). The personal attack rule provides exceptions as follows:

(1) Personal attacks on foreign groups or foreign public figures; (2) Personal attacks occurring during uses by legally qualified candidates; (3) Personal attacks made during broadcasts not included in paragraph (b)(2) of this section and made by legally qualified candidates, their authorized spokespersons, or those associated with them in the campaign, on other such candidates, their authorized spokespersons or persons associated with the candidates in the campaign; and (4) Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs.

47 C.F.R. § 73.1920(b).

27. *Red Lion Brdcast. v. FCC*, 395 U.S. 367, 389-90 (1969). For a recent criticism of the personal attack rule and related FCC regulations, see Reed Hundt & Blair Levin, *D.C. Circuits: And Protection for All*, BRILL'S CONTENT, Dec. 1998/Jan. 1999, at 56.

28. 418 U.S. 241 (1974).

29. 395 U.S. 367 (1969).

30. *Miami Herald Publ'g Co.*, 418 U.S. at 256.

press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."<sup>31</sup>

The responsibilities and obligations imposed upon broadcasters to serve the public are primarily based on the notion that those who receive licenses to operate radio and television stations are trustees of a valuable limited resource that belongs to the public. The U.S. Court of Appeals for the District of Columbia Circuit articulated the broadcasters' responsibilities:

A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcasting station cannot. . . . [A] broadcast license is a public trust subject to termination for breach of duty.<sup>32</sup>

Among the first obligations imposed on broadcasters was the equal opportunity rule, as set forth by section 315 of the Act.<sup>33</sup> The rule provided that any licensee allowing one legally qualified candidate for elective office to use its station must allow all other candidates for the same office equal opportunity to use the station.<sup>34</sup> Thus, if airtime is sold to one candidate, comparable airtime must be offered to all other candidates. If airtime is given free to one candidate, it must be offered free to all. The equal opportunity rule, also known as the "equal time" rule, found its policy justification in "assur[ing] a legally qualified candidate that he would not be subjected to unfair disadvantage from an opponent through favoritism in selling or donating time or in scheduling political broadcasts."<sup>35</sup>

Similarly, the Supreme Court took special note of the legislative purpose of the equal opportunity rule in the context of the broadcast media's role in disseminating political speech: "Recognizing radio's [and television's] potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to

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31. *Id.* For an affirmative comment on the Supreme Court decisions in *Red Lion* and *Miami Herald Publishing Co.*, see Bollinger, *supra* note 23. But cf. L.A. Powe, Jr., *Or of the [Broadcast] Press*, 55 TEXAS L. REV. 39 (1977).

32. *Office of Comm. of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

33. See 47 U.S.C. § 315(a) (1994).

34. See 47 U.S.C. § 315 (1994).

35. Nicholas Zapple, *Historical Evolution of Section 315*, in *THE PAST AND FUTURE OF PRESIDENTIAL DEBATES*, *supra* note 4, at 57.



candidates for office without discrimination . . . ."<sup>36</sup> At the same time, Congress sought to limit the ability of broadcast licensees to utilize their significant power to achieve electoral success for themselves or their favorite candidates.<sup>37</sup>

In the wake of the Federal Communications Commission's (FCC's) ruling in the *Lar Daly*<sup>38</sup> case, Congress substantially revised the equal opportunity rule<sup>39</sup> in 1959. In response to a mayoral candidate's equal opportunity complaint, the FCC held that the candidate was entitled to equal opportunity because the TV stations broadcast film clips of the candidate's opponent in connection with his official functions as the incumbent mayor.<sup>40</sup> The *Lar Daly* ruling was a "radical departure" from the FCC's prior interpretation of the equal opportunity provision. For a number of years up to 1958, the FCC held the provision inapplicable to the appearance of a candidate on a newscast on the ground that "such an appearance did not constitute a 'use' of the broadcast facility insofar as the candidate did not directly or indirectly initiate the filming or presentation of the event."<sup>41</sup>

The crippling effect of the *Lar Daly* decision on broadcasters was unmistakable. The equal opportunity requirement, if the FCC and the courts strictly enforced the *Lar Daly* ruling, would "tend to dry up meaningful radio and television coverage of political campaigns."<sup>42</sup> "The inevitable consequence [of *Lar Daly*] is that a broadcaster will be reluctant to show one political candidate in any news-type program lest he assumes the burden of presenting a parade of aspirants."<sup>43</sup> Consequently, the public—viewers and listeners—would lose in the end.<sup>44</sup>

While recognizing the conflicting policy goals between active political debate and rigidly equal political debate under section 315 of the Act, Congress amended the equal opportunity provision by adding four exemptions as follows:

Appearance by a legally qualified candidate on any—

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36. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 529 (1959).

37. *See McGlynn v. New Jersey Pub. Brdcast. Auth.*, 439 A.2d 54, 65 (N.J. 1981).

38. 40 F.C.C. 302 (1959).

39. For a discussion of the equal opportunity rule prior to its 1959 amendment, see Jack H. Friedenthal & Richard J. Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445 (1958-59).

40. *See CBS, Inc.*, 18 Rad. Reg. (P & F) 238, *recons. denied*, 18 Rad. Reg. (P & F) 701 (1959).

41. *Chisholm v. FCC*, 538 F.2d 349, 351-52 (D.C. Cir. 1976) (citation omitted).

42. S. REP. NO. 86-562, at 9 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2564, 2572.

43. *Id.* at 2571.

44. *Zapple*, *supra* note 35, at 58.

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.<sup>45</sup>

Congress was aware of the possibility that exemptions from the equal opportunity rule might induce a broadcasting station to push its favorite candidate while ignoring others. It took a calculated risk, however, in expanding broadcasters' editorial freedom to make judgments in handling news programs. Congress concluded that insofar as news coverage of elections was concerned, "[t]he public benefits [of a dynamic coverage of political campaigns] are so great that they outweigh [sic] the risk that may result from the favoritism that may be shown by some partisan broadcasters."<sup>46</sup>

In a Senate joint resolution in 1960, Congress suspended section 315 of the Act to allow the "Great Debates" between Democrat John F. Kennedy and Republican Richard M. Nixon.<sup>47</sup> Since the FCC had little time to fully evaluate the 1959 amendment to section 315, Congress temporarily suspended section 315.<sup>48</sup> The FCC ruled in 1962 that political debates were

45. 47 U.S.C. § 315 (1994).

46. S. REP. NO. 86-562, at 10.

47. See S.J. Res. 207, 86th Cong. (1960):

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That that part of section 315(a) of the Communications Act of 1934, as amended, which requires any licensee of a broadcast station who permits any person who is a legally qualified candidate for any public office to use a broadcasting station to afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, is suspended for the period of the 1960 presidential and vice presidential campaigns with respect to nominees for the offices of President and Vice President of the United States. Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest.*

Pub. L. No. 86-677, 74 Stat. 554 (1960).

48. See S. REP. NO. 86-1539, at 2 (1960).

not exempt from the equal opportunity rule.<sup>49</sup> With this action, the FCC effectively excluded all debates from the equal opportunity requirements of section 315(a)(4).<sup>50</sup>

The FCC decisions of 1962 remained in effect until 1975, when the FCC overturned the decisions in response to petitions from both the Aspen Institute Program on Communications and Society and CBS. In what is now known as the *Aspen* decision, the FCC ruled:

[D]ebates between qualified political candidates initiated by nonbroadcast entities (non-studio [sic] debates) . . . will be exempt from the equal time requirements of [s]ection 315, provided they are covered live, based upon the good faith determination of licensees that they are "bona fide news events" worthy of presentation, and provided further that there is no evidence of broadcaster favoritism.<sup>51</sup>

The FCC explained that it based its 1962 decisions on an apparently "incorrect reading" of the legislative history of the newscast exemptions and subsequent related congressional action.<sup>52</sup> The U.S. Court of Appeals for the District of Columbia Circuit in *Chisholm v. FCC*<sup>53</sup> upheld the FCC's new ruling on the 1959 Amendment to section 315. The court reasoned that "the legislative history is inconclusive, but we find much support for the [FCC's] new interpretation. In these circumstances, we are obligated to defer to the [FCC's] interpretation, even if it is not the only interpretation possible."<sup>54</sup>

In November 1983, the FCC reversed its *Aspen* decision and held that the equal opportunity rule exempts broadcaster-sponsored debates.<sup>55</sup> The FCC noted the congressional intent in amending section 315 in 1959 and the expected benefits of its new rule:

[A]lthough Congress expressed a concern that the freedom and flexibility accorded to broadcasters in their news programming might result in favoritism amongst candidates, Congress intended to permit

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49. See *NBC, Inc.*, 40 F.C.C. 370 (1962); *Good Will Station, Inc.*, 40 F.C.C. 362 (1962).

50. See *Chisholm v. FCC*, 538 F.2d 349, 353 (D.C. Cir. 1976).

51. *Id.* at 351 (footnote omitted).

52. See Petitions of the Aspen Inst. Program on Comm. & Soc'y & CBS, Inc., *Memorandum Opinion and Order*, 55 F.C.C.2d 697, para. 22, 35 Rad. Reg.2d (P & F) 49 (1975). The FCC noted: "Our conclusion that the debates were not exempt rested on language in the House Report of August 6, 1959, which indicated that in order for on-the-spot coverage to be exempt the appearance of the candidates would have to be 'incidental to' the coverage of a separate news event." *Id.* (citing *Goodwill Station, Inc.*, 40 F.C.C. 362, 364 (1962)).

53. 538 F.2d 349 (1976).

54. *Id.* at 366.

55. See Petitions of Henry Geller & Nat'l Ass'n of Brdcs. & the Radio-TV News Dirs. Ass'n to Change Common Interp. of Subsections 315(a)(3) and (4) of the Comm. Act, *Report and Order*, 95 F.C.C.2d 1236, 54 Rad. Reg.2d 1246 (1983).

that risk in order to foster a more informed electorate. Congress did not intend to exclude broadcaster-sponsored debates from the [s]ection 315 exemptions to eliminate any risk of favoritism because to do so would undermine the informing goal of the statute. In our view, the common denominator of all exempt programming is bona fide news value. Thus, a debate's exempt status is not and should not be contingent upon whether a broadcaster is the sponsoring or controlling entity—for such control generally would not affect the program's news value. Furthermore, exempting broadcaster-sponsored debates should serve to increase the number of such events, which would ultimately benefit the public.<sup>56</sup>

The U.S. Court of Appeals for the District of Columbia Circuit upheld the new FCC ruling in 1984 without a written opinion.<sup>57</sup> Now, debates among political candidates, regardless of who sponsors the debates, are news events under the Act and can be sponsored by broadcast stations without triggering equal time obligations.

### III. ACCESS TO TV DEBATES: LEGISLATIVE FRAMEWORK

The 1983 FCC ruling on section 315 contributed to a sharp increase in the number of election debates. The total grew from five in 1980, to fourteen in 1984, and more than forty in 1988.<sup>58</sup> Nevertheless, the FCC rule tends to create "a clear role conflict when media companies are involved both in trying to arrange debates and in reporting on the progress of the negotiations."<sup>59</sup> NBC correspondent Andrea Mitchell said that the difficulty of covering a candidate on the campaign trail would be intensified when the head of a network was negotiating with that candidate's campaign manager over a debate in which the candidate had enormous interest.<sup>60</sup>

One further implication of the FCC rule for political debates was that it "represents a substantial change because for the first time the broadcast outlets will decide who will and who will not be included [in the debates]. Again, this will allow broadcast stations not only to report the news, but to determine it as well."<sup>61</sup> It should be noted, however, that exclusion of candidates from debates is not necessarily related to the issue of whether the broadcast media do sponsor the debates.

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56. *Id.* at para. 19 (footnote omitted).

57. See *League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984).

58. See *HELLWEG ET AL.*, *supra* note 2, at 7-9.

59. Erwin Chemerinsky, *Changing the Rules of the Game: The New FCC Regulations on Political Debates*, 7 HASTINGS COMM. & ENT. L.J. 1, 12 (1984).

60. See *Hearing on Presidential Debates*, *supra* note 3, at 91 (statement of Paul G. Kirk, Jr., Cochairman of the Commission on Presidential Debates).

61. Chemerinsky, *supra* note 59, at 14.

Participation of particular candidates, more often than not, depends on a number of factors bearing on the candidates themselves, sponsoring organizations, and the candidates' opponents. Who sponsors the debates, of course, can be critical to minor-party candidates. "The inclusion of third parties and independent candidates poses an extremely difficult problem, especially if the major parties are sponsors of the presidential debates."<sup>62</sup>

Thus, Congress has made efforts to solve the issue of whether candidates' participation in election debates should be institutionalized by law. Representative Charles Bennett, for example, proposed the Presidential Candidate Debate Act in 1991<sup>63</sup> as an amendment to the Internal Revenue Code of 1986 to require presidential candidates to participate in debates as a condition for eligibility for payments under the Presidential Election Campaign Fund Act. The bill defined "presidential candidate debate" as "a debate at which each candidate nominated for election to the office of President of the United States by a major party appears and participates in a regulated exchange of questions and answers on political, economic, and other issues."<sup>64</sup> The narrow definition of "debate," however, would not improve the likelihood of third-party participation in debates. Moreover, there would be no sanctions for those major-party candidates in refusing to debate a "significant" third-party candidate. The bill most likely would mandate debates between the two major-party candidates only.<sup>65</sup>

In 1992, Senator Bob Graham and Representative Edward J. Markey introduced a second bill entitled the National Presidential Debates Act.<sup>66</sup> The bill, which would amend the Internal Revenue Code of 1986 to make presidential debates "a permanent part of our political process," required that candidates participate in three presidential debates and one vice presidential debate in return for federal matching funds.<sup>67</sup> In mandating debates for presidential candidates, the bill recognized that "candidates have an obligation to inform and educate the voters because the voters' tax

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62. NEWTON N. MINOW & CLIFFORD M. SLOAN, *FOR GREAT DEBATES: A NEW PLAN FOR FUTURE PRESIDENTIAL TV DEBATES* 41 (1987).

63. H.R. 60, 102d Cong. (1991).

64. *Id.* § 2.

65. See Keith Darren Eisner, Comment, *Non-major-party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 1016 (1993).

66. See S. 2213, 102d Cong. (1992). The Presidential Debates Act of 1992 was the companion bill to the Democracy in Presidential Debates Act introduced in 1991 by Representative Timothy Penny. H.R. 791, 102d Cong. (1991). For a discussion of the Democracy in Presidential Debates Act, see *infra* notes 73-77 and accompanying text.

67. See *Hearing on Presidential Debates*, *supra* note 3, at 10 (statement of Rep. Edward J. Markey).

dollars subsidize the candidates' campaigns."<sup>68</sup> The bill further required that the presidential candidates participate in debates with all other candidates who satisfy certain objective criteria for significance, such as being on the election ballots in at least forty states and eligibility for receiving matching funds under the Internal Revenue Code or raising not less than five hundred thousand dollars on or after January 1 of the year preceding the presidential election year.<sup>69</sup> One flaw of the bill, as originally submitted to the Senate in 1991, was that it provided that the debate sponsor be "a nonpartisan or bipartisan organization."<sup>70</sup> As Markey candidly acknowledged, Congress intended the provision to include "the possibility of sponsorship by the Commission on Presidential Debates (CPD), which skillfully staged the 1988 general election debates and which has continued to play an active and positive role in calling for institutionalized debates."<sup>71</sup>

The Democracy in Presidential Debates Act bill preceded the proposed National Presidential Debates Act. One commentator termed the preceding bill as "a reasonable compromise."<sup>72</sup> Representative Timothy J. Penny, who sponsored the Democracy in Presidential Debates Act, stated that his bill would institutionalize debates in presidential election campaigns by requiring all "significant candidates to participate in at least one primary election debate and two general election debates."<sup>73</sup> Under the criteria set forth in the bill, a "significant" presidential candidate eligible for participation in debates should be on at least forty state ballots and receive public financing or have raised at least five hundred thousand dollars in the years preceding the election.<sup>74</sup> Under these criteria, five presidential candidates including the two major-party candidates would have been eligible for general election debates in 1992.<sup>75</sup> Penny said that "[t]he debates must be organized by a nonpartisan entity, and must be

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68. Susan E. Spotts, *Recent Developments: The Presidential Debates Act of 1992*, 29 HARV. J. ON LEGIS. 561, 562 (1992).

69. See S. 2213, 102d Cong. § 3(e)(3)(A)-(C) (1992).

70. S. 491, 102d Cong. § 2(a)(1) (1991).

71. 137 CONG. REC. 4369, 4370 (1991). The Commission on Presidential Debates (CPD), a bipartisan group formed by the Republican and Democratic national committees in 1987, was criticized for discriminating against minor-party candidates by allowing the major parties to dictate debate arrangements. See *Hearing on Presidential Debates*, *supra* note 3, at 227 (CRS Report for Congress: Campaign Debates in Presidential General Elections).

72. Bennett J. Matelson, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238, 1283 (1994) (footnote omitted).

73. *Hearing on Presidential Debates*, *supra* note 3, at 19.

74. See *id.* at 18.

75. See *id.* at 211 (testimony of Deborah Green, president of Ross & Green).

structured to allow the candidates to question each other directly. If a candidate refused to participate in the required debates, he or she would lose their federal matching funds."<sup>76</sup>

In contrast to the National Presidential Debates Act, the Democracy in Presidential Debates Act would provide for sponsorship of debates by only nonpartisan organizations and the CPD controversy would be obviated. Most significantly, the Democracy in Presidential Debates bill provided an opportunity for significant minor-party candidates to participate in the debates with major-party candidates. The inclusion of third-party candidates in the debates can improve the overall quality of the debates in that candidates outside of the two major parties can force discussion issues that the major-party candidates tend to ignore and they can expose the voters to a wider range of views.<sup>77</sup> Stuart Reges, the National Director of the Libertarian Party, described the third parties' important role in American politics:

From the Socialist Party to the People's Party to the Prohibition Party, the traditional role of third parties in this country has been to focus on issues not being addressed by the major parties. Third parties and independents are usually more in touch with the immediate concerns of the American public and are willing to say what the major candidates are often afraid to say.

....

Far from being a distraction, inclusion of third party candidates would enliven the debates and make them much more valuable to the American people. Most of these people will probably choose not to vote for the third party candidates they hear, but they will be glad the third parties were<sup>78</sup> in the debates to focus them more on the pressing issues of the day.

#### IV. JUDICIAL INTERPRETATIONS OF ACCESS TO TELEVISION DEBATES: PRE-*FORBES* CASES

During an oral argument at the U.S. Supreme Court on October 8, 1997, Chief Justice William H. Rehnquist asked attorney Kelly J. Shackelford, who represented Ralph P. Forbes in *Forbes v. Arkansas Educational Television Commission*:<sup>79</sup> "Well, how about a [s]tate where the write-in procedure is very simple, and someone who is perhaps defeated in a primary is going to run as a write-in, and his name is Willy Wacko, and he's regarded as a total loser by all political observers. Do [government

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76. *Id.* at 19 (statement of Rep. Penny).

77. See Spotts, *supra* note 68, at 577.

78. *Hearing on Presidential Debates*, *supra* note 3, at 166-67 (statement of Stuart Reges, National Director of the Libertarian Party).

79. 22 F.3d 1423 (8th Cir. 1994), *cert. granted*, 520 U.S. 1114 (1997).

officials] have to give him access [to the public TV debate]?"<sup>80</sup> Shackelford replied: "No . . . I don't think they do. Again, you have an objective standard, set in place beforehand, a ballot access law. That's perfectly allowed. . . . [W]hat the Court has said is, it's okay to ensure a modicum of support. However, the Court has never said that the [g]overnment can subjectively pick and choose."<sup>81</sup>

In many ways, the colloquy between Chief Justice Rehnquist and attorney Shackelford illuminates the complexity of determining who will be invited to candidate debates. Access to airtime for legally qualified candidates for federal elective office is allowed under section 312 of the Act unless the exemptions to the equal opportunity rule apply. As discussed previously, political debates are one of the exemptions to the equal opportunity rule.<sup>82</sup> Nevertheless, the exclusion from political debates of minor-party candidates from presidential debates has been "a persistent source of litigation."<sup>83</sup> Those candidates who demand access to debates often turned to the First Amendment in making their claims against the private sponsors or broadcasters carrying the debates.

*Johnson v. FCC*<sup>84</sup> is the seminal case in which the U.S. Court of Appeals for the District of Columbia Circuit rejected a presidential candidate's claim for access to television debates. Sonia Johnson, the 1984 presidential candidate of the Citizens Party, sought an order from the FCC that the League of Women Voters (League) should include her in their television debates in the fall of 1984. She asserted that, if the League excluded her, the debates would violate her rights under the Act and the First Amendment.<sup>85</sup> The FCC rejected Johnson's complaint.

On appeal, Johnson argued that her exclusion from the 1984 debates restricted her access to the ballot and infringed her associational choices under the First Amendment because the television debates by 1984 had become "so institutionalized as to be a prerequisite for election."<sup>86</sup> The D.C. Circuit characterized Johnson's argument as one that "essentially boils down to a demand for broadcast access."<sup>87</sup> The court acknowledged that broadcast media's "tremendous power to inform and shape public

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80. *Arkansas Educ. TV Comm'n v. Forbes*, No. 96-779, 1997 WL 664266, at \*33 (U.S. Oct. 8, 1997) (U.S. Supreme Court Official Transcript).

81. *Id.*

82. For a discussion of the FCC's interpretation of the exemptions to section 315 of the Communications Act, see *supra* notes 40-41, 50-56 and accompanying text.

83. *Matelson*, *supra* note 72, at 1238.

84. 829 F.2d 157 (D.C. Cir. 1987).

85. See *id.* at 159.

86. *Id.*

87. *Id.* at 160.



opinion and the immutable scarcity of broadcast frequencies have created both tremendous opportunities and serious hazard for free expression."<sup>88</sup> The federal appeals court continued: "We face a far more pervasive scheme of regulation, and a significantly greater congressional sensitivity when . . . the First Amendment rights of candidates for public office and their supporters are involved."<sup>89</sup>

Nevertheless, the D.C. Circuit rejected Johnson's assertion that the voices of minor-party candidates might be silenced by the major parties or encounter discrimination from biases of large broadcasters. The court pointed to the Act as a mechanism that prevents political debates from being monopolized by one or a few candidates and that enables candidates with all different political viewpoints to use the media.<sup>90</sup>

The federal appeals court held that "the televising of a debate sponsored by a non-network [sic] third party does not itself trigger access for competing candidates" under the equal opportunity provisions of the Act.<sup>91</sup> The court also noted that candidates have no "legally cognizable" right under the First Amendment to participate in the broadcast debates organized by a nonbroadcast party.

Johnson's demand for access to a particular program, in this case, televised debates, would raise "the risk of an enlargement of [g]overnment control over the content of broadcast discussion of public issues."<sup>92</sup> While broadcasters do not enjoy the same First Amendment journalistic freedom as newspapers, the court emphasized congressional and judicial refusal to allow unlimited governmental interference in the programming decisions of broadcasters.<sup>93</sup> The court then expressed its awareness of "the importance of preserving a large measure of journalistic discretion for broadcasters as a serious First Amendment issue."<sup>94</sup>

The *Johnson* ruling has clearly eliminated any further First Amendment claims for a right to access to debates televised by private sponsors. In 1994, one legal commentator argued: "Remarkably, this has also been true of [F]irst [A]mendment claims of viewpoint discrimination brought against *public* television stations who sponsor debates and select debate participants."<sup>95</sup>

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88. *Id.*

89. *Id.* at 161.

90. *See id.*

91. *Id.*

92. *Id.* at 162 (footnote omitted).

93. *See id.*

94. *Id.* at 163.

95. Matelson, *supra* note 72, at 1259.

A closer look at several cases arising from television debates sponsored by public television stations indicates, however, that it has not been as remarkable as it seems. Four years after *Johnson*, the New Jersey Supreme Court ruled on a claim of a gubernatorial candidate for access to primary election "forums" organized by a public television network in New Jersey.<sup>96</sup> In 1990, the Eighth and Eleventh Circuits also confronted the issue of whether public television stations may exclude legally qualified candidates for public office from debates.<sup>97</sup> More recently, the Eighth Circuit overruled its 1990 decision.<sup>98</sup> The conflict between these circuits has highlighted the thorny issue of how editorial autonomy should be defined according to the private or public status of broadcasters under the First Amendment.<sup>99</sup>

The increasing litigation against public broadcasting stations since 1990 should come as little surprise because "[t]he growth of public broadcasting in recent years has been accompanied by controversy in certain quarters regarding the autonomy of that institution, especially with regard to program content generally and news and public affairs programs in particular."<sup>100</sup> *McGlynn v. New Jersey Public Broadcasting Authority*<sup>101</sup> is a good example. *McGlynn*, which the New Jersey Supreme Court described as "a case of major importance,"<sup>102</sup> concerned the relationship between the journalistic freedom of public television stations and their duty of fairness in election coverage.

This 1981 New Jersey case involved Richard McGlynn, a candidate for the Republican nomination for governor. McGlynn challenged the refusal of the New Jersey Public Broadcasting Authority (Authority) to include him in a forum on major issues to be telecast by the Authority during the final week of the 1981 primary campaign. He alleged that his

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96. See *McGlynn v. New Jersey Pub. Brdcast. Auth.*, 439 A.2d 54 (N.J. 1981).

97. See *Chandler v. Georgia Pub. Telecomms. Comm'n*, 917 F.2d 486, 489 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991); *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), *overruled by Forbes v. Arkansas Educ. TV Comm'n Network Found.*, 22 F.3d 1423 (8th Cir. 1994) (en banc).

98. See *Forbes*, 22 F.3d 1423 (8th Cir. 1994), *rev'd*, 523 U.S. 666 (overruling *DeYoung*, 898 F.2d 628 (8th Cir. 1990)).

99. See Erick Howard, Comment, *Debating PBS: Public Broadcasting and the Power to Exclude Political Candidates from Televised Debates*, 1995 U. CHI. LEGAL F. 435, 436 (1995).

100. Annotation, *State Regulation of Content of and Representation on Program Presented by "Public Broadcasting" Television or Radio Station*, 27 A.L.R. 4th 375, 376 (1984).

101. 439 A.2d 54 (N.J. 1981).

102. *Id.* at 56.

exclusion from the program violated various state statutes regulating elections and public broadcasting as well as the Act.<sup>103</sup>

The New Jersey Supreme Court acknowledged that "[o]ne of the crucial problems facing any candidate, especially one of limited means, is access to television."<sup>104</sup> The court held that Congress granted the Authority "wide discretion" in determining broadcast content, subject only to considerations of "fairness."<sup>105</sup> The court held:

We emphasize now that the statute governing the Authority, designed to promote the public interest, does not confer on an individual candidate a *right* to be included in any given program or series of programs. His only right is to fairness, balance[,] and equity in the *entirety* of the Authority's election coverage over the course of the campaign.<sup>106</sup>

The New Jersey Supreme Court also rejected the public forum concept in access to the broadcast since the concept has been strictly limited to those areas in which everyone has been historically free to speak, except for the "time, place, or manner" restrictions.<sup>107</sup> The public does not have a general right of access to the state public television, the court ruled, but legally qualified candidates may be granted the right of access under section 312 of the Act. The court concluded that the Authority's exclusion of McGlynn from the forum was a "reasonable exercise" of the Authority's right to make editorial judgments pursuant to federal and state law.<sup>108</sup>

The Eighth Circuit in 1990 ruled that candidates have no First Amendment right to participate in election debates televised on public broadcast networks. In *DeYoung v. Patten*,<sup>109</sup> the Iowa Public Television (IPT) excluded Garry DeYoung, a legally qualified candidate for U.S. Senate, from a debate between the two major-party candidates aired in 1984. He sued IPT, Executive Producer Larry G. Patten, Program Director John C. White, and *Iowa Press* commentator Dean Borg alleging that IPT and its employees had violated his First Amendment rights by excluding him from the debate and denying his request for equal time, which also violated his rights under the Act.<sup>110</sup>

DeYoung also claimed that IPT manipulated the political process and contributed to his loss in the 1984 Senate election. He sought thirty

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103. *See id.*

104. *Id.* at 60.

105. *Id.* at 64.

106. *Id.* at 72.

107. *Id.* at 64.

108. *See id.*

109. 898 F.2d 628 (8th Cir. 1990).

110. *See id.* at 630.

thousand dollars in damages against IPT and others for “social ostracism, denial of access to the public, manipulation of the political process, and mental anguish.”<sup>111</sup> The defendants moved to dismiss the suit, arguing that DeYoung had failed to state a claim because he had no First Amendment right to appear on public television or on a particular program. In addition, they asserted that no private cause of action exists under the equal opportunity rule of the Act.<sup>112</sup>

The federal district court dismissed DeYoung’s suit, holding that he had no First Amendment right to broadcast time and that the FCC had exclusive jurisdiction over the equal opportunity claim. The court ruled that there was no “state action” because the state had “administratively” distanced itself from the editorial and programming decisions of IPT and others.<sup>113</sup> DeYoung appealed the district court’s ruling, maintaining that the decision was erroneous in determining that there was no state action in IPT’s exclusion of him from the television debate.

The Eighth Circuit rejected the district court’s conclusion that the defendants did not act under color of state law in excluding DeYoung. Applying the traditional definitions of acting under color of state law<sup>114</sup> and state action,<sup>115</sup> the court found that IPT, a state agency, employed White, Patten, and Borg, and thus the three were state actors. “[G]enerally, a public employee acts under color of state law while acting in his [or her] official capacity or while exercising his [or her] responsibilities pursuant to state law,” the court said.<sup>116</sup>

However, the federal appeals court agreed with the district court that DeYoung had no First Amendment right to appear on television, “at least to any extent greater than the limited right of access granted by the equal time provisions of the [Act].”<sup>117</sup> The court emphatically declared that a political candidate “does not have a ‘constitutional right of broadcast access to air

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111. *Id.* (citation omitted).

112. *See id.*

113. *Id.* at 631.

114. “The traditional definition of acting under color of state law requires that the defendant in a [42 U.S.C.] § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

115. “To constitute state action, ‘the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible,’ and ‘the party charged with the deprivation must be a person who may fairly be said to be a state actor.’” *Id.* (citation omitted).

116. *DeYoung*, 898 F.2d at 632 (alteration in original) (citation omitted).

117. *Id.*

his [or her] views.'"<sup>118</sup> The court ruled DeYoung's claim invalid on the ground that a public television station is not a public forum. A public station would be a public forum if it were "designed to provide a general public right of access to its use" or if a history of public access existed insofar as it did not conflict with the station's primary activity.<sup>119</sup> In rejecting DeYoung's monetary claims, as the district court did, the appeals court held that the Act did not provide for a private cause of action for violation of the equal opportunity provisions.<sup>120</sup> The proper procedure would be to complain to the FCC.<sup>121</sup>

The second case involving candidates' access claims to public television was *Chandler v. Georgia Public Telecommunications Commission*.<sup>122</sup> *Chandler*, which followed four months after *DeYoung*, arose from a dispute over a television debate between candidates for the lieutenant governorship of Georgia. Walker Chandler, the Libertarian candidate for lieutenant governor of Georgia, sought to enjoin the Georgia Public Telecommunications Commission (GPTC) from broadcasting the debate sponsored by GPTC unless GPTC included him in the debate. GPTC invited only the Democratic and Republican candidates to the debate,<sup>123</sup> while offering Chandler thirty minutes of airtime as an opportunity to present his views under section 315 of the Act.<sup>124</sup> In his suit filed in federal district court, Chandler contended that such an exclusion violated his rights under the First and Fourteenth Amendments.

The federal district court in Georgia issued a temporary restraining order to GPTC either to include Chandler in the debate or not to broadcast the program. The court held that exclusion of ballot-qualified candidates solely on the basis of the popularity of their political opinions was viewpoint discrimination in violation of the First Amendment and an impermissible prior restraint on speech.<sup>125</sup> The court further held that even under minimal scrutiny, the state could produce no rational justification for rejecting Chandler and thus had violated his Equal Protection rights.<sup>126</sup>

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118. *Id.* (alteration in original) (citing *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980)).

119. *Id.* at 633 (citing *Muir v. Alabama Educ. TV Comm'n*, 688 F.2d 1033, 1042 (5th Cir. 1982)).

120. *See id.*

121. *See id.* at 635.

122. 917 F.2d 486 (11th Cir. 1990).

123. *See id.* at 488.

124. *See id.* at 488 n.1.

125. *See Chandler v. Georgia Pub. Telecomms. Comm'n*, 749 F. Supp. 264, 268 (N.D. Ga. 1990), *vacated*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991).

126. *See id.* at 269.

The Eleventh Circuit reversed the district court's order promptly. The federal appeals court held that GPTC was not a public forum because it was not accessible to everyone who had a message. The court stated:

[T]he degree of control that a public broadcast licensee can exercise over its broadcast programming consistent with the First Amendment depends on the mission of the communicative activity being controlled. Where the activity does not function as a pure marketplace of ideas, the state is permitted to regulate content in order to prevent hampering the primary function of the activity.<sup>127</sup>

GPTC as a public television station had an obligation to serve the public interest. GPTC's employees made the editorial judgments on their programs to meet their public interest requirements, according to the appeals court. The court added: "Obviously a decision to broadcast one program excludes, for that time, all other programs."<sup>128</sup>

The federal appeals court rejected the district court's conclusion that GPTC's exclusion of candidates from television debates was viewpoint restrictive in violation of the First Amendment. The appeals court reasoned that GPTC's decision to invite only the Democratic and Republican candidates to a debate related to its determination that the debate exclusively between the two candidates would be "of the most interest and benefit" to Georgia's citizens.<sup>129</sup> "A decision to air any show is necessarily content-based," the court stated, and it is "reasonable" if it is "not an effort to suppress expression merely because public officials oppose the speaker's views."<sup>130</sup> Referring to *DeYoung*, the Eleventh Circuit noted that they were not alone in finding that "the First Amendment does not necessarily grant political candidates the right to be included in candidate debates."<sup>131</sup>

The Eleventh Circuit, however, warned against the "Orwellian state thought control" of public television stations through selective broadcasting of viewpoints.<sup>132</sup> Without deciding, the court predicted that "the use of state instrumentalities to suppress unwarranted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment."<sup>133</sup> On the other hand, the court expressed concern that requiring public television stations to include all qualified candidates in debates would force the stations to forgo broadcasting controversial views.

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127. *Chandler*, 917 F.2d at 488 (citation omitted).

128. *Id.* (footnote omitted).

129. *Id.* at 489.

130. *Id.* (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

131. *Id.* at 489 n.5 (citing *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990)).

132. *Id.* at 489.

133. *Id.*

The court concluded: "The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harshness on public television."<sup>134</sup>

Judge Thomas A. Clark, in his dissent, claimed that while GPTC was not a traditional public forum, it was "at a minimum . . . a nonpublic forum" through which "candidates' ideas will be exchanged on the issue of state governance and will then be telecast to voters throughout Georgia."<sup>135</sup> Relying on the First Amendment standards for application of the nonpublic forum doctrine,<sup>136</sup> he accepted the district court's finding that GPTC's exclusion of Chandler was unreasonable and not viewpoint neutral.<sup>137</sup>

Noting a distinction between private and public broadcasters in their right to exclude qualified candidates from debates, Judge Clark stated that private broadcast networks may be justified in their exclusion of candidates from debates,<sup>138</sup> but public broadcasters may not. He called attention to the *raison d'être* of public broadcasting, which is "significantly different" from that of private broadcasting:

Public broadcasting is premised on the belief that the free market will not provide all of the programming and information necessary for an educated public. Thus, many programs that would fail miserably to pay their own way on the private networks appear on public television. The political debates at issue appear to be a case in point.<sup>139</sup>

Judge Clark compared GPTC's exclusion of Chandler from the television debates to the government's action to prevent expression "simply because officials do not agree with the message conveyed."<sup>140</sup> He emphasized the value of an informed electorate to our political process: "The [informed] electorate is the ultimate check on governmental abuse of power. To allow political appointees . . . to 'pick and choose' the

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134. *Id.* at 490.

135. *Id.* at 491 (Clark, J., dissenting).

136. Judge Clark quoted *Cornelius v. NAACP Legal Defense & Education Fund, Inc.* in his discussion of the nonpublic forum doctrine:

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

*Id.* at 491 (Clark, J., dissenting) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

137. *See id.*

138. *See id.* at 492 (citing *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987)).

139. *Id.*

140. *Id.*

information the public receives from the interplay of candidates speaking unrehearsed short-circuits [sic] the controls built into our governmental system."<sup>141</sup>

Judge Clark criticized the majority for failing to differentiate political debates from news or documentary programs. The ideas conveyed in a particular television news program may be expressed through a wide variety of media in an equally effective manner, he acknowledged, but candidates' political speech through debates is vastly different:

[A]n idea is not a candidate, and freedom of speech has a greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to inform the public far more effectively than any candidate's lone appearance could, by creating a synergism between the candidates' immediately conflicting positions. For the state to set up such a debate and exclude certain candidates not only puts its stamp of approval on the favored candidates, it also "curtail[s] access to ideas" by preventing the ideas and information that would be produced through the debating candidates' interaction from coming to light.<sup>142</sup>

In 1996, the Eighth Circuit refused to enjoin a state-run television network from staging debates from excluding third-party candidates. In *Marcus v. Iowa Public Television*,<sup>143</sup> Jay B. Marcus, the Natural Law Party candidate for Congress from Iowa, and others sued Iowa Public Television (IPTV), seeking injunctive relief requiring IPTV to include all legally qualified candidates in the "joint conferences"<sup>144</sup> of major-party candidates in the *Iowa Press* programs in October 1996.<sup>145</sup>

The U.S. District Court for the Southern District of Iowa, applying *Forbes II*, found the "Iowa Press" programs a limited public forum because a public television network staged them as an opportunity for the public to hear the views of the candidates interviewed on the programs.<sup>146</sup> Nevertheless, the court rejected Marcus's claim that IPTV violated his First Amendment rights by excluding him from the candidate debates. Again

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141. *Id.*

142. *Id.* at 493-94.

143. 97 F.3d 1137 (8th Cir. 1996).

144. The federal district court stated that while the *Iowa Press* programs typically "are not debates but simply journalists' interviews of persons in the news generally," reasonable people watching the "joint appearances" in the programs of the major candidates for Congress from Iowa would have found the programs "debates" among the candidates. *Marcus v. Iowa Pub. TV*, 24 Media L. Rep. (BNA) 2531, 2532 (S.D. Iowa 1996).

145. *See id.* at 2531.

146. *See id.* at 2532-33 (citing *Forbes v. Arkansas Educ. TV Comm'n Network*, 93 F.3d 497 (8th Cir. 1996)). The district court cited the slip opinion of the Eighth Circuit in *Forbes v. Arkansas Educational Television Communications Network*.



relying on *Forbes II*, the court held: "Persons presenting political viewpoints on a public television network may be excluded from staged debates if the exclusion is narrowly tailored and will serve compelling state interests."<sup>147</sup>

The district court said that IPTV did not arbitrarily exclude Marcus but excluded him for "principled" reasons.<sup>148</sup> The court found a "sufficient state interest" in IPTV's determination that the programs were "bona fide news interview" programs and that Marcus was not "newsworthy" as a candidate.<sup>149</sup> In concluding that IPTV established "a compelling state interest" in excluding Marcus, the court stated:

It is profoundly important that the defendant network and its news editor be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise independent and editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves.<sup>150</sup>

According to the district court, IPTV's operation as a press institution free from political pressure from within and without state government is "a compelling governmental purpose" to achieve under the Act and its relevant FCC rules and regulations.<sup>151</sup> The court also determined that IPTV's exclusion of Marcus was "narrowly tailored" to serve the compelling state interest. It noted that IPTV offered Marcus an equal time opportunity on other IPTV programs to present his views and that IPTV's action against Marcus was "an exercise of journalistic discretion [that] meets generally accepted broadcast industry standards for making judgments about newsworthiness."<sup>152</sup>

Rejecting Marcus's assertion that *Forbes II* should be controlling precedent, the district court distinguished *Forbes II* from the case at bar. In *Forbes II*, the Arkansas public television station did not have a compelling and narrowly tailored justification for excluding Forbes solely because it did not consider him to be a "viable" candidate. By contrast, the court stated, the present case addressed Marcus's "lack of newsworthiness and not lack of viability" as a candidate.<sup>153</sup>

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147. *Id.* at 2533 (citation omitted).

148. *See id.* (citing *Forbes v. Arkansas Educ. TV Comm'n*, 22 F.3d 1423, 1429 (8th Cir. 1994)).

149. *Id.*

150. *Id.*

151. *Id.* (citing *League of Women Voters*, 468 U.S. at 378).

152. *Id.*

153. *Id.* at 2533.

On appeal, a three-judge panel of the Eighth Circuit denied Marcus injunctive relief.<sup>154</sup> The court, in a two-to-one opinion,<sup>155</sup> disagreed with the district court that Marcus had failed to show irreparable harm. If Marcus's claim that he had a First Amendment right to speak on IPTV's limited public forum was valid on First Amendment grounds, it would constitute "an irreparable harm."<sup>156</sup> The court of appeals, in balancing the harms of both parties, accepted the district court's determination that IPTV would suffer greater harm from the grant of injunction than Marcus from denial of the injunction. The court recognized IPTV as a state actor, but it "is a media organization, which necessarily must make editorial decisions regarding the content of its programming."<sup>157</sup> The court continued: "Interference with that editorial discretion constitutes a significant injury to the editorial integrity of IPTV, which interferes with their primary mission of serving the public."<sup>158</sup> Additionally, the court, in illustrating the substantial possible harm of the injunction to IPTV, stated that IPTV would cancel the debates entirely "rather than impair its journalistic integrity and its credibility with its viewers."<sup>159</sup>

Similar to the district court's refusal to apply *Forbes II*,<sup>160</sup> the Eighth Circuit rejected Marcus's *Forbes II*-based argument that IPTV excluded him based on a "subjective" determination of newsworthiness and thus improperly exercised state authority.<sup>161</sup> The appeals court narrowed the application of *Forbes II*: "*Forbes II* cannot be read to mandate the inclusion of every candidate on the ballot for any debate sponsored by a public television station. Nor does *Forbes II* suggest that public television station administrators, because they are government actors, have no discretion whatsoever in making broadcast determinations."<sup>162</sup> In addition, the appeals court reiterated the district court's distinction between *Forbes II* and the present case, stating that a candidate's "viability" was a matter of political choice for voters to make, while a candidate's "newsworthiness" was a matter of journalistic discretion.<sup>163</sup>

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154. See *Marcus v. Iowa Pub. TV*, 97 F.3d 1137, 1138 (8th Cir. 1996).

155. Judge George J. Fagg joined Judge Frank J. Magill, author of the majority opinion. It is noteworthy that Judges Magill and Fagg dissented in *Forbes I*.

156. *Marcus*, 97 F.3d at 1140.

157. *Id.* at 1141.

158. *Id.* (quoting Appellees' Memorandum in Opposition to Emergency Motion at 7).

159. *Id.*

160. See *supra* note 153 and accompanying text.

161. See *Marcus*, 97 F.3d at 1142.

162. *Id.*

163. See *id.* For a discussion of the district court's distinction between *Forbes* and *Marcus*, see *supra* note 153 and accompanying text.

The Eighth Circuit held that IPTV, "[b]y its very nature and under controlling policies" as a media organ, "must be concerned with the newsworthiness of the issues and speakers included in its programming."<sup>164</sup> Noting the structural and procedural mechanism in ensuring the "journalistic and editorial integrity" of IPTV's programming, the court acknowledged IPTV's compelling interest in meeting its public service goals to serve the citizenry of Iowa and of limiting access to newsworthy candidates.<sup>165</sup> The court concluded:

[T]here is also a public interest in having a debate between some candidates rather than having no debate whatsoever. In addition[,] . . . IPTV's professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges; it is clearly in the public interest in having a state-operated public television free from unnecessary interference by a federal court.<sup>166</sup>

In his rather brief dissent, Judge C. Arlen Beam argued that *Forbes II* should be binding upon the present case because the two cases deal with the exclusion of legally qualified candidates from television debates sponsored by public television stations.<sup>167</sup> He also contended that the television stations excluded *Forbes* and *Marcus* on similarly subjective grounds. No one could advance a "realistic argument" that IPTV's opinion on *Marcus*'s "newsworthiness" and the Arkansas television network's conclusion regarding *Forbes*'s "political viability" are distinguishable.<sup>168</sup> Quoting extensively from Chief Judge Richard S. Arnold's opinion in *Forbes II*, Judge Beam stated that "[t]he court (and the district court as well) seeks to distinguish the indistinguishable."<sup>169</sup>

While the petition to the U.S. Supreme Court for certiorari in *Forbes II* was pending, the Eighth Circuit agreed to review *Marcus* en banc. Nevertheless, the Eighth Circuit postponed considering *Marcus* until the U.S. Supreme Court ruled on *Forbes II*.<sup>170</sup> On June 30, 1998, the federal appeals court, affirming the district court's decision, held that the Supreme Court's decision in *Forbes* controlled because the broadcasters did not exclude third-party candidates because of their viewpoint and the exclusion was "reasonable."<sup>171</sup>

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164. *Marcus*, 97 F.3d at 1142.

165. *See id.* at 1142-44.

166. *Id.* at 1144.

167. *See id.* (Beam, J., dissenting).

168. *See id.*

169. *Id.*

170. *See* Brief for the FCC and the United States as Amici Curiae Supporting Petitioner, *Arkansas Educ. TV Comm'n v. Forbes*, 93 F.3d 497 (8th Cir. 1996) (No. 98-7790), *cert. granted*, 520 U.S. 1114, 1997 U.S. LEXIS 1639 (1997) (No. 96-779).

171. *Marcus v. Iowa Pub. TV*, 150 F.3d 924, 925 (8th Cir. 1998) (en banc).

V. ARKANSAS EDUCATIONAL TELEVISION COMMISSION V.  
FORBES: THE SUPREME COURT'S RULING

Ralph P. Forbes was not invited to a debate between the two major-party candidates for Congress in Arkansas in 1992. Forbes, a ballot-qualified independent candidate, sued the debate's organizers, Arkansas Educational Television Network (AETN), alleging that he had a right to participate in the debate and that AETN officials excluded him from the debate because of his political beliefs.<sup>172</sup> He sought injunctive relief in an Arkansas federal district court and moved for preliminary injunction to mandate his inclusion in the debate.<sup>173</sup> The federal district court dismissed Forbes's request for injunctive relief on October 20, 1992. Judge Arnold, sitting as a single circuit judge, rejected Forbes's request for an injunction pending appeal, and a panel of the Eighth Circuit affirmed Judge Arnold's decision, reasoning that *DeYoung* controlled.<sup>174</sup>

Forbes renewed his claims against AETN on November 2, 1992, while amending his complaint by including private television stations. In response, AETN argued that Forbes had no rights under the First or Fourteenth Amendments to appear in a television debate and failed to state a cause of action against AETN. The district court agreed and concluded, following *DeYoung*, that Forbes had no First Amendment right of access to the public airwaves and that the Act did not provide a private cause of action.<sup>175</sup>

Forbes appealed the dismissal to the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit in *Forbes I*,<sup>176</sup> sitting en banc, affirmed in part and reversed in part the district court's ruling. The appeals court agreed with the district court that there was no private cause of action to enforce the Act and that Forbes should have brought his claim before the FCC.<sup>177</sup> The appeals court held, however, that Forbes had a "qualified right of access" created by AETN's sponsorship of the debate.<sup>178</sup> The court took

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172. In support of his claim that AETN discriminated against him in the debate based on his policy views, Forbes claimed that an AETN official said that "the network would run 'St. Elsewhere' [sic] rather than a debate that [would include him] and that another AETN official stated that Forbes [was excluded] because he was not a 'serious' candidate." Forbes v. Arkansas Educ. TV Comm'n, 22 F.3d 1423, 1426 (8th Cir. 1994).

173. See *id.*

174. See *id.* at 1427. For a discussion of *DeYoung*, see *supra* notes 109-21 and accompanying text.

175. See *id.*

176. 22 F.3d 1423 (8th Cir. 1994) (en banc).

177. See generally *id.*

178. See *id.* at 1428.

special note of the application of the Fourteenth Amendment to AETN's actions as a state actor, unlike those of private television stations.

Characterizing *DeYoung* as "wrongly decided," the Eighth Circuit, in an opinion by Judge Arnold for the six-to-five majority, held that a state-owned television station cannot exclude candidates from debates on the basis of their viewpoints "absent a compelling state interest."<sup>179</sup> The court, applying the "limited public forum" doctrine,<sup>180</sup> found that the debate at issue was a limited public forum. The court reasoned: "Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the [t]hird [c]ongressional seat."<sup>181</sup> The court held that if it determined the debate to be a limited public forum, Forbes would have a First Amendment right to access the debate.<sup>182</sup>

Even under the nonpublic forum analysis,<sup>183</sup> the Eighth Circuit ruled that "if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights."<sup>184</sup> The court noted that Forbes was a member of the class of speakers—candidates for the third district congressional seat—for whose special benefit AETN created the debate and he wished to address the topic encompassed by the debate—who should be elected to Congress.<sup>185</sup>

In an obvious effort to avoid ambiguity with respect to the limitations of its ruling, the Eighth Circuit went to great lengths to include a statement of clarification: "Our holding applies only to debates that are sponsored by state instrumentalities. It does not apply to private-television-sponsored debates, nor to debates sponsored by third parties that are reported in good faith by public television stations."<sup>186</sup> The Eighth Circuit remanded the case to the district court to determine whether AETN could provide "a rational

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179. *Id.* at 1428-29.

180. *Id.* The Eighth Circuit defined the limited public forum as "a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, a limited topic, or a limited class of speakers." *Id.* at 1429 (citations omitted).

181. *Id.*

182. *See id.*

183. For a discussion of the nonpublic forum analysis, see *supra* note 136.

184. *Forbes*, 22 F.3d at 1429.

185. *See id.*

186. *Id.* at 1430 n.5.

and viewpoint-neutral justification" for its exclusion of Forbes from the debate.<sup>187</sup>

Judge T. McMillian, joined by four judges, filed a spirited dissent. Judge McMillian, who authored the now overruled *Young* decision, took issue with the majority's ruling that Forbes was a legally qualified candidate with a First Amendment right to participate in the debate and the debate was a public forum for First Amendment purposes. Calling the debate a "nonpublic forum," he argued: "Like private commercial television, public television is not a traditional public forum; it does not extend a general invitation to the public to appear on or participate in its programs."<sup>188</sup> Moreover, he held that the debate was not a "limited or quasi public forum" either. He said: "[T]he format of this candidate debate was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates."<sup>189</sup>

Judge McMillian stated that the debate would be a nonpublic forum. Control over access to the debate, according to him, could be based on speaker identity "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."<sup>190</sup> He asserted that if AETN had excluded Forbes from the debate within the "editorial and programming discretion" to structure the debate, AETN's action would be reasonable and viewpoint neutral.<sup>191</sup>

On remand, a jury heard the case in June 1995. The district court held that the television debate sponsored by AETN was a nonpublic forum. A jury found that AETN's exclusion of Forbes from the debate did not result from political pressure or from its opposition to his political opinions. The district court entered judgment for AETN.<sup>192</sup>

In *Forbes II*, on appeal, the Eighth Circuit reversed. The court agreed with Forbes that the debate was a limited public forum and that AETN's stated reason for excluding him—that he was not a "viable" candidate—was not legally sufficient. The court held: "[A] governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized by it on such a subjective ground.

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187. *Id.* at 1430.

188. *Id.* at 1431.

189. *Id.* at 1431-32.

190. *Id.* at 1432 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

191. *Id.*

192. See generally *Forbes v. Arkansas Educ. TV Comm'n*, 93 F.3d 497 (8th Cir. 1996).

To uphold such a defense would, in our view, place too much faith in government.”<sup>193</sup>

While admitting that there is “no bright line or objective test” for determining the character of the debate, the court stated “without reservation” that the debate was “a limited public forum” in that AETN, by staging the debate, opened its facilities to candidates running for the third district congressional seat to express their views on campaign issues.<sup>194</sup> The exclusion by AETN of Forbes from the debate on no basis other than party affiliation was untenable either as a matter of law or logic, according to the court. “It must be emphasized that we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment, and the exclusion of one such speaker has the effect of a prior restraint—it keeps his views from the public on the occasion in question.”<sup>195</sup>

The appeals court rejected the legal sufficiency of AETN’s determination of Forbes’s “political viability” as a candidate as a reason for excluding him from the debate. The court declared:

The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of the First Amendment. . . . Political viability is a tricky concept. We should leave it to the voters at the polls, and to the professional judgment of nongovernmental journalists. A journalist employed by the government is still a government employee.<sup>196</sup>

The court determined that those people who made the judgment about Forbes were not ordinary journalists but government employees. The court added: “The First Amendment exists to protect individuals, not government.”<sup>197</sup>

The U.S. Supreme Court reversed the Eighth Circuit’s decision that a political debate controlled by a state-owned television station constituted a public forum and that the candidate could not be excluded without violating the Constitution. The Court stated:

[T]he public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting. . . . In the case of television broadcasting . . . broad rights of access for outside speakers would be antithetical, as a general rule, to the

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193. *Id.* at 500.

194. *See id.* at 504.

195. *Id.*

196. *Id.* at 505.

197. *Id.*

discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.<sup>198</sup>

The majority opinion written by Justice Anthony Kennedy held that the broadcasters' "public interest, convenience, and necessity" obligations under the Act require both public and private broadcasters to exercise substantial editorial discretion in selecting their programming.<sup>199</sup> "As a general rule," the Supreme Court held, "the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination."<sup>200</sup> In connection with the editorial discretion of broadcasters, the Court cautioned against judicial involvement in the programming decisions of the broadcasters: "Were the judiciary to require, and so to define and approve, pre-established [sic] criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."<sup>201</sup>

The Court further ruled that "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."<sup>202</sup> But the Court recognized a narrow exception to the limitation in the context of candidate debates. Unlike other broadcasts, according to the Court, debates are by design a forum for political speech by candidates. They are also "of exceptional significance in the electoral process."<sup>203</sup> The Court elaborated:

Deliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates. A majority of the population cites television as its primary source of election information, and debates are regarded as the "only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral forum."<sup>204</sup>

Thus, the First Amendment protects access to candidate debates and, therefore, "a broadcaster cannot grant or deny access to a candidate debate

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198. *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998).

199. *See id.*

200. *Id.*

201. *Id.* at 674.

202. *Id.* at 675.

203. *Id.*

204. *Id.* (quoting Congressional Research Service, *Campaign Debates in Presidential General Elections*, summary, June 15, 1993).



on the basis of whether it agrees with a candidate's views."<sup>205</sup> And the Court concluded that the AETC debate was "a forum of some type."<sup>206</sup>

Relying upon its public forum precedents,<sup>207</sup> however, the Supreme Court ruled that the AETC debate was not a traditional public forum because "the almost unfettered access of a traditional public forum would be incompatible with the programming dictates a television broadcaster must follow."<sup>208</sup> The Court also held that the debate was not a public forum designated as such by the government because it was not made "generally available" to any candidate for Arkansas's third district congressional seat.<sup>209</sup> Instead, AETC made a candidate-by-candidate determination as to who would be invited to the debate.<sup>210</sup> The Court emphasized that "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers."<sup>211</sup> The selective process used by AETC for its debate made the forum nonpublic.

Even though the debate was a nonpublic forum, however, the Supreme Court ruled that AETC's power to exclude candidates was not unfettered. "To be consistent with the First Amendment," the Court wrote, "the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property."<sup>212</sup> The Supreme Court found that AETC excluded Forbes not because of his viewpoints but because of his "objective lack of support" among the public as a candidate for Congress. The Court termed AETC's decision to exclude Forbes "a reasonable, viewpoint-neutral

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205. *Id.* at 676.

206. *Id.*

207. In its discussion of the public forum theory, the Supreme Court cited *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990). See *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

208. *Id.* at 678.

209. See *id.* at 679.

210. See *id.* at 679-80.

211. *Id.* at 679. The Court further elaborated:

On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers . . . . On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission," to use it.

*Id.* (citation omitted).

212. *Id.* at 682 (citing *Cornelius*, 473 U.S. at 800).

exercise of journalistic discretion" that does not violate the First Amendment.<sup>213</sup>

The Supreme Court, also wary of the chilling effect of the public forum application to candidate debates on public broadcasting, noted that the Eighth Circuit's ruling would result "in less speech, not more."<sup>214</sup> The Court stated: "On logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates would 'actually undermine the educational value and quality of debates'" and "might choose not to air candidates' views at all."<sup>215</sup>

Justice John Paul Stevens, along with Justices David Souter and Ruth Bader Ginsburg, dissented, arguing that the Eighth Circuit decision should be affirmed because AETC's decision to exclude Forbes from the debate failed to "adhere to well-settled constitutional principles."<sup>216</sup> He criticized the majority of the Court for "barely mention[ing] the standardless character" of AETC's exclusion of Forbes and "understat[ing] the constitutional importance of the distinction between state ownership and private ownership of broadcast facilities."<sup>217</sup>

Justice Stevens also disagreed with the majority that the crucial issue in *Forbes* was whether AETC created its debate as a public forum or a nonpublic forum. Instead, the dispositive issue in the case, according to Justice Stevens, was whether AETC used the specifically defined contours of the debate forum in excluding Forbes.<sup>218</sup> He questioned the "nearly limitless discretion" under the flexible standard used by AETC in excluding Forbes from the debate. "The importance of avoiding arbitrary or viewpoint-based exclusions from political debates militates strongly in favor of requiring the controlling state agency to use (and adhere to) pre-established [sic], objective criteria to determine who among qualified candidates may participate."<sup>219</sup>

Justice Stevens emphasized that the AETC staff members who excluded Forbes from the debate were not ordinary journalists but state employees. He compared AETC's control of the debate to a local government official's authority to issue permits to use public facilities for expressive activities.<sup>220</sup> He concluded: "Requiring government employees

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213. *Id.* at 683.

214. *Id.* at 681 (citation omitted).

215. *Id.* at 681 (citation omitted).

216. *Id.* at 684 (Stevens, J., dissenting).

217. *Id.*

218. *See id.* at 689-95.

219. *Id.* at 693.

220. *See id.* at 689-95.

to set out objective criteria by which they choose which candidates will benefit from the significant media exposure that results from state-sponsored political debates would alleviate some of the risk inherent in allowing government agencies—rather than private entities—to stage candidate debates.”<sup>221</sup>

## VI. DISCUSSION AND ANALYSIS

The First Amendment right of the broadcast media in general and the public broadcasters in particular has been expanded steadily over the years. The editorial rights of public broadcasting stations is a case in point. The statutory and judicial framework of public broadcasting has ensured that public broadcast licensees exercise as much editorial discretion as their commercial counterparts, if not more.<sup>222</sup> Of course, the constitutional contours of the enhanced freedom of the press for public broadcasters emerged from the notion that radio spectrum should be used for the interest, convenience, and necessity of the American public.

*Arkansas Educational Television Commission v. Forbes*,<sup>223</sup> one of the most closely watched First Amendment cases of the Supreme Court's 1997 term,<sup>224</sup> carries significant implications for public broadcasting. The immediate impact of *Forbes* was to settle various issues raised in several lower court rulings on the public television stations' rights to exclude minor-party candidates from political debates. The Court's decision in *Forbes* was sorely needed as a judicial road map for the ever confusing doctrinal justifications for taking an all-or-nothing position in favor of public broadcasting or political candidates. As one journalism researcher argued in 1997, “[s]tate-owned licensees need such [a precedential] opinion in order to act in the public interest and to be protected from litigation and legal costs.”<sup>225</sup>

The importance of the Court's ruling in *Forbes* cannot be overemphasized. If the Eighth Circuit's decision had been affirmed, it would have directly affected about two-thirds of the noncommercial government-licensed television and radio stations, which are most likely to sponsor debates among political candidates.<sup>226</sup> “[A]ll public broadcasters

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221. *Id.* at 695.

222. *See* *Muir v. Alabama Educ. TV Comm'n*, 688 F.2d 1033, 1041 (5th Cir. 1982).

223. 523 U.S. 666 (1998).

224. *See* *Greenhouse*, *supra* note 13, at 28.

225. Laura E. Johnson, *A Limbo of Ambiguity: The Editorial Rights of State-owned Licensees* 42 (unpublished research paper, University of Florida (Gainesville) (on file with author)). Johnson presented her paper at the Association for Education in Journalism and Mass Communication convention in Chicago on July 30-Aug. 2, 1997.

226. *See* Thomas C. Berg, *Excluding a Candidate from a Debate on a State-owned*

with connection with gov[ernment] could be forced to abandon public affairs programming for fear of violating [the] First Amendment," according to several public television lawyers.<sup>227</sup>

Indeed, it was not pure speculation that *Forbes*, if affirmed by the Court, would have allowed judicial second guessing of the public broadcasters' editorial decision-making process. This would lead the public broadcast media to forgo, rather than sponsor, candidate debates to avoid litigation from those excluded from the debates. As the Court aptly pointed out in *Forbes*,<sup>228</sup> the decision of *Nebraska Education Television*, immediately after *Forbes II*, to cancel a debate among the Democratic and Republican nominees for U.S. Senate was a good illustration of the real chilling effect of *Forbes II* and other similar decisions on public television stations.<sup>229</sup>

Chief Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit succinctly and persuasively discusses the "editorial discretion" that public television needs in staging a debate among the electoral candidates:

A debate cannot be staged without deciding who may participate in it, and given the inescapable need to choose, the criterion of choice that the television station used was as good as any. Speech values were on both sides of the equation in *Forbes*. If, to avoid restricting speech, the station invited all the candidates to participate in the debate, the time available to the frontrunners would be curtailed, yet what frontrunners have to say is probably more valuable to the audience than what the fringe candidates have to say—probably, not certainly. Major parties can originate as fringe parties, and fringe parties can contribute ideas that are later picked up by major parties. Still, restricting the speech opportunity of the fringe candidates may increase the speech benefits of the debate overall.<sup>230</sup>

Another cause of concern arising from *Forbes*-like litigation was an inexorable financial drain on the public television media. It is common knowledge that public broadcasting operates with a tight budget. "[L]egal costs to the broadcaster may increase, as stations turn to legal counsel more

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*Television Station: Editorial Judgment or Suppression of Free Speech?*, PREVIEW U.S. SUP. CT. CASE., Sept. 18, 1997, at 40, 44.

227. *Public Affairs Programming by Public Broadcasters at Risk in Court Case*, COMM. DAILY, Apr. 18, 1997, at 4 [hereinafter *Public Affairs Programming*].

228. See *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 681 (1998).

229. See C. David Kotok, *ETV Cancels Debate Between Nelson, Hagel*, OMAHA WORLD-HERALD, Aug. 23, 1996, at 1; C. David Kotok, *Nelson, Hagel to Appear But Not Debate at Fair*, OMAHA WORLD-HERALD, Aug. 24, 1996, at 1; Editorial, *Minor-party Farce Denied Voters a Debate*, OMAHA WORLD-HERALD, Aug. 27, 1996, at 10.

230. *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 701 (7th Cir. 1998).

frequently for advice on programming decisions," one commentator noted.<sup>231</sup> "In general, state-owned stations, as public, noncommercial stations do not have unlimited funds to dedicate to legal counsel. Such costs could also have a chilling effect on programming if excessive legal costs reduce funds available for programming or equipment."<sup>232</sup>

Awareness of AETN's litigation cost to defend *Forbes* since 1994 would probably lead most public broadcasting people to reconsider committing their resources to staging political debates among major candidates, while excluding, in good faith, fringe candidates whom they have determined to be unworthy of inclusion. AETN spent more than two hundred and fifty thousand dollars on its legal defense in *Forbes* to date, "with more spending to come," according to AETN Executive Director Susan Howarth.<sup>233</sup>

On the other hand, pre-*Forbes* state and federal court decisions had confronted other related issues, including the First Amendment status of public broadcasting employees as journalists, the distinction between "political debates" vis-à-vis nondebate programs on public television, and the public forum status of public television in First Amendment law. They seem to have reached a consensus on reporters and editors that employees of state-owned television stations act under the color of state.

But the judicial balancing of editorial discretion granted to state employee/journalists differs from court to court. This was one of the thorny problems facing the lower courts in *Forbes*, even though the judicial and FCC interpretations of the Act were clear cut in holding that "every broadcaster, whether public or private, [must] . . . use its own editorial discretion to serve the public interest, and no broadcast may cede that responsibility to members of the general public."<sup>234</sup>

In this connection, what would be the most efficient means for government-owned broadcasting licensees to serve the public interest in sponsoring candidate debates? This question clearly challenged the Court to set forth a functional guideline on balancing public broadcasters' independent news judgments and candidates' rights to participate in state-sponsored television debates. As the *Forbes* opinion indicates, the Court avoided the challenge. As a result, lower courts are still left with no guidance from *Forbes* as to when public broadcasting should be open to

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231. Johnson, *supra* note 225, at 41.

232. *Id.*

233. *Public Affairs Programming*, *supra* note 227, at 4.

234. Brief for the FCC and the United States as Amici Curiae Supporting Petitioner, *Arkansas Educ. TV Comm'n v. Forbes*, 93 F.3d 497 (8th Cir. 1996), *cert. granted*, 520 U.S. 1114, 1997 U.S. LEXIS 1639 (1997) (No. 96-779).

minor-party candidates as a forum. Instead of dictating a myopic and intrusive blanket rule for the public stations, however, the Court might have taken a calculated risk and let the public broadcasters devise their own objective standards on sponsoring candidate debates within the framework of journalistic freedom under the First Amendment.

The result of *Forbes* is that public broadcasters who intend to sponsor political debates fall subject to less regulation than commercial broadcasters. Currently, public television must follow few mandatory preestablished criteria to determine which candidate to include in the debate. In contrast, Congress requires private broadcasters to comply with the political debate regulations under the Federal Election Campaigns Act.<sup>235</sup>

Meanwhile, the Court has addressed the question of whether public broadcasting—not to mention commercial broadcasting—should be considered a public or nonpublic forum, especially in the context of political candidate debates. The Court declared unanimously that the candidate debate is neither a traditional public forum nor a designated public forum, but a nonpublic forum subject to reasonable restrictions.<sup>236</sup> The Court correctly applied public forum concepts in *Forbes*. Most importantly, however, it represents and further reinforces a judicial trend to broaden the nonpublic forum while refusing to create new public forums if possible.

In this regard, the clarifying restatement of the public forum test in *Forbes* is expected to carry far-reaching ramifications for the future of the public forum doctrine. That is, Justice Kennedy's discussion and application of the public forum doctrine will serve as the definitional guideline for courts in the post-*Forbes* era as they draw bright lines between categories of government facilities. *Chicago Acorn v. Metropolitan Pier & Exposition Authority*,<sup>237</sup> a 1998 case of the U.S. Court

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235. The regulations promulgated under the Federal Election Campaigns Act read in pertinent part:

(c) *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established [sic] objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

11 C.F.R. § 110.13(c) (1998).

236. Justice Stevens, with whom Justices Souter and Ginsburg joined in his dissent, stated: "The Court has decided that a state-owned television network has no 'constitutional obligation to allow every candidate access to' political debates that it sponsors. I do not challenge that decision." *Arkansas Educ. TV Comm. v. Forbes*, 523 U.S. 666, 683 (1998) (Stevens, J., dissenting) (citation omitted).

237. 150 F.3d 695 (7th Cir. 1998).

of Appeals for the Seventh Circuit, is illustrative. Chief Judge Posner, citing *Forbes*, declared that Navy Pier, owned by the Metropolitan Pier and Exposition Authority (MPEA) in Chicago, is a nonpublic facility under the First Amendment meaning because MPEA rents its meeting rooms to organizations for use by their members and guests rather than by the public at large.<sup>238</sup> Similarly, a federal district court in Missouri held that the underwriting program of a state-owned university radio station is not a designated public forum. "[T]he government does not create a designated public forum when it reserves eligibility to a class of speakers who must obtain permission to use the property," according to the district court.<sup>239</sup>

The mechanical inclusion of minor-party candidates in television debates under the blanket rule enunciated by the Eighth Circuit in *Forbes II* might have been an improvement of the subjective standards used by broadcasters in deciding which candidates to invite to the debates. Nevertheless, it runs the risk of ignoring the value of individual broadcasters' editorial judgments in ensuring an open marketplace of ideas in television broadcasting. As the Court stated in 1973:

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.<sup>240</sup>

To a considerable extent, the Court in *Forbes* has heeded the institutional role of public broadcasting by expanding the open marketplace of ideas, which is crucial to American body politic.

Is there any room for a legislative role in devising a fair test for excluding minor-party candidates from public television debates? The Court in *Forbes* answered: Yes. The majority acknowledged the possibility that Congress might impose "neutral rules for access to public broadcasting."<sup>241</sup> Nonetheless, the Court's overture to Congress to provide access for minor-party candidates may end up being an exercise in futility. Given that various congressional attempts to reform the current system have been unsuccessful thus far,<sup>242</sup> Congress will not be inclined to pass debate reform legislation in the near future, especially if the reform bill aims to provide more debate opportunity for fringe candidates. "Allowing major parties to choose criteria for inclusion seems naive," one law review

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238. See *id.* at 700 (citing *Forbes*, 523 U.S. at 679).

239. *Knights of Ku Klux Klan v. Bennett*, 29 F. Supp.2d 576, 584 (E.D. Mo. 1998).

240. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973).

241. *Forbes*, 523 U.S. at 675.

242. For a discussion of congressional efforts to reform political debates, see *supra* notes 63-78 and accompanying text.

author explained in 1993, "since they have little incentive to voluntarily include minor-party candidates. They lack such incentive because conventional wisdom suggests that a lesser-known political figure invariably gains credibility by sharing the political spotlight of his better-known competitor."<sup>243</sup>

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243. Eisner, *supra* note 65, at 1017 n.193.



